IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED MUTUAL OIL COMPANY, a corporation, and J. M. McLeod, *Appellants,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	No. 2787
CONSOLIDATED MUTUAL OIL COMPANY, a corporation, and J. M. McLeod, *Appellants.* vs. THE UNITED STATES OF AMERICA, *Appellee.*	No. 2788
NORTH AMERICAN OIL CONSOLIDATED, a corporation, et al., *Appellants.* vs. THE UNITED STATES OF AMERICA, *Appellee.*	No. 2789

REPLY BRIEF IN BEHALF OF APPELLEE

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Reply Brief in Behalf of Appellee

This reply brief, filed under leave of the Court, obtained at the time of the oral argument, is addressed to certain contentions of the appellants

made in all of the three cases under submission and to others directed to certain phases of the different cases. This brief indicates in which of the several cases the points under discussion are raised, unless raised in all.

Appellants Are Not Within the Clause of the Taft Withdrawal Order Providing for Entry in Cases of "Locations and Claims Existing and Valid."

In all three of the cases it is contended that the pertinent order of withdrawal exempts appellants from the effect of the order. That clause relied upon reads: "All locations and claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." The clause is misquoted on page 30 of the Government's brief, as elsewhere in the records in this case. (The word "filed" should be "field".) A certified copy of the order is filed with the Clerk. The appellants contend that the words, "All locations and claims existing and valid" include "a location or claim not perfected by discovery of oil." (See Appellants' brief, top of page 6.) . The position of the United States is that the word "location," as contained in the order of withdrawal, was employed in the sense in which it is used in the Mining Law. On page 2 of appellants' brief it is admitted that "a mining location on the public land confers no rights prior to actual discovery, which Congress is bound to respect," and on page 3 thereof it is admitted that "what Congress could do in this par-

ticular, the President has the right to do." There also appears on the same page an admission that, "Upon none of our claims had there been a discovery of oil or gas on September 27, 1909." The position of the appellants that the word "location" and the words "claims existing and valid" were used by the President loosely or otherwise than as defined by the law is not sound. The usual rules applicable in construction of statutes apply here. The latter part of the clause in question is that such location and claims existing and valid on the date of the order of withdrawal shall proceed to entry "in the usual manner after *field investigation* and *examination*." The President did not possess the power under the law to provide that "location" should proceed to entry under the Mining Law after field investigation and examination in cases where there had been no "discovery" on the particular claim in question. Congress had provided that discovery was a part of the location, and must precede entry and patent. The position of appellants necessarily involves the contention that President Taft intended to provide for entry under the Mineral Land Law where there had been no discovery. Obviously, when, in the words of the clause, he authorized persons "to proceed to entry in the usual manner, after field investigation and examination," he had in mind only those who had reached the stage where they were ready for "field investigation and examination," and those who had some other "claims existing and valid" under some other

law than the Mineral Land Law. The clause must be given the construction which necessarily follows upon the use of the words in their accepted meaning, in the light of surrounding circumstances, and the land laws with which it must be considered in *pari materia*. The result is that its provisions are restricted in their application to those instances in which persons upon the public lands at the date of the order of withdrawal had vested rights under the law. This being true, appellants are in no position to invoke the provisions of that clause. What the President meant by the language above quoted is attempted to be more fully pointed out in the appellee's main brief heretofore filed.

The President was bound to respect all claims "existing and valid" on the date of the withdrawal order, under whatsoever law such valid and existing claim arose. The word "location" was sufficient, in so far as the Mining Law is concerned, and the words "valid and existing claim" were sufficient in so far as the Homestead and all other land laws under which claimants may have acquired vested rights were concerned. The clause was one of assurance and repose to "locators" under the Mineral Land Law, and "existing and valid claims" under all other laws.

The situation, as it confronted the President, inducing him to make the order of withdrawal, is set forth by the Supreme Court of the United States

in the *Midwest Oil Company* case, 236 U. S., 459, as follows:

> "Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer, but by others on adjoining land. And as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible so as to share what would otherwise be taken by the owners of nearby wells.
>
> The result was that oil was so rapidly extracted that on September 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with enclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific Coast and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would 'be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away * * *.' 'In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use * * *' and 'pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended.'
>
> This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President, who, on September 27, 1909, issued the following proclamation:
>
> 'Temporary Petroleum Withdrawal No. 5' "—

There is nothing in that situation that at all resembles the alleged conditions attempted to be painted in appellants' brief.

Construction of the Pickett Act.

In all three of the cases appellants invoke the remedial provisions of the so-called Pickett Act. On page 31 of their brief it is stated that "this Act was at least applicable to claims where the possession and discovery were such that courts would have protected the occupants against intruders, the learned Attorney General, himself, concedes." That is the full extent to which the proviso goes. The pertinent part of that Act is as follows:

> "Provided that the right of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

As has been shown in the briefs of the appellants and of the Government, no person claiming under the Mineral Land Law was prior to June 25, 1910, protected against an order of withdrawal properly made unless there had been a discovery. It is admitted on page 34 of appellants' brief: "As originally framed, the Bill (the Pickett Act), ratified the Taft withdrawal order of September 27, 1909, in express terms." That was substantially all the Bill

did. Congress was pressed to consider the claims of a number of people who were affected by that withdrawal. By amendment the proviso above quoted was inserted. As stated on page 34 of appellants' brief, " It is not open to doubt that it was designed for the express purpose of protecting a certain class of unprotected locators, which it was believed—whether rightly or wrongly is not important—the Taft Withdrawal Order did not protect at all."

This is, no doubt, true, and the interesting question is, what was the situation which Congress intended to meet, and exactly what class of people did Congress intend to protect by the proviso of the Pickett Act.

The situation which appealed to Congress appears on pages 42, etc., of Plaintiff's main brief. The extent to which Congress purposed to go in conferring new rights, as against the Government, in favor of occupants and claimants of these mineral lands, was measured by the extent to which the courts had gone in protecting such occupants and claimants against the forcible and fraudulent intrusion of third persons.

The language of the proviso of the Pickett Act, here under consideration, was borrowed from the case of *Miller* vs. *Chrisman* (140 Cal., 440; 197 U. S., 313). It is substantially the same language as used by the Court in *McLemore* vs. *Express Oil Co.* (158

Cal., 559); and *Borgwardt* vs. *McKittrick* (164 Cal., 650), and in other cases cited in the briefs heretofore filed.

At the top of page 32 of the appellants' brief there is a quotation from a letter from the Attorney General to the Secretary of the Interior, as follows:

> "The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent and upon the same conditions as it was protected by pre-existing law against private intruders."

It is there stated by the appellants, following this quotation:

> "There is, therefore, upon this point no dispute between the Government and ourselves as to the general proposition that any claim *accompanied by possession* and what would be considered due diligence under the pre-existing law is restored and revivified by the foregoing provision of the Pickett Bill."

It is not accurate to say that the rights, as they exist under the proviso of the Pickett Act, were "restored and revivified," inasmuch as the rights there conferred never before existed as against the Government. It is accurate to say that whatever rights were secured by the proviso were *conferred* by it. Similar character of rights had existed in favor of occupants diligently prosecuting work leading to discovery on land claimed under the Mining Laws, but no such right had ever *existed* as against the Government, until conferred by the proviso of the Pickett Act.

With great respect it is submitted that Judge Bledsoe, in the McCutchen case, quoted from, in appellants' brief, erroneously failed to make the distinction between the effect of the Taft Order of Withdrawal and the proviso of the Pickett Act, here sought to be pointed out. The Pickett Act is essentially remedial, and was intended to do nothing more than to confer rights against the Government, and in favor of a certain class of claimants and occupants, similar to those which theretofore had existed under the decisions of the courts in favor of such class of claimants and occupants against third parties. As to all lands upon which a third party could lawfully enter before the order of withdrawal, the withdrawal became effective. Thereafter it attached whenever diligent work or possession by the claimant ceased.

It is admitted by the appellants, in their brief, as follows:

> "And we further know it to have been the law, at the date of said order, that the courts would recognize and protect such oil locations or claimants only as were accompanied by *pedis possessio* and due diligence looking to a discovery." (See top page 6.)

What constituted due diligence which protected the occupant or claimant from intrusion by third persons is discussed in the main brief and elsewhere herein.

The Pickett Act says: "The right of any person * * * shall not be affected or impaired," etc. Prior

to the withdrawal of the lands in suit, persons had the right to mark the boundaries of mineral claims thereon, and post notices defining the extent of such claims, and, within limits fixed by law, proceed to explore for discovery of minerals. If such discovery had been made before withdrawal of the land from acquisition, a right became vested in the explorer. As, however, the land was withdrawn before discovery, further exploration was unlawful, until the passage of the Pickett Act. The purpose of the proviso of the Act, therefore, was to avoid the application of orders of withdrawal *"theretofore"* or *"thereafter"* made to a certain specified class of claimants.

The "right" to explore for oil and gas, as it existed under the general Mineral Land Law of the United States, up to the time of the withdrawal, was, by the proviso of the Pickett Act, not to be affected or impaired as to occupants or claimants who were (a) bona fide, (b) in diligent prosecution of work, and (c) of a character leading to the discovery of oil or gas, *so long as* (and no longer than) the "said work" shall be prosecuted diligently and continuously.

This Court has already in mind the definition of what is the diligent prosecution of work leading to the discovery of oil. The distinction is found in *Miller* vs. *Chrisman* (*Supra*); *Borgwardt* vs. *McKittrick Oil Co.* (130 Pac. 417); *Crossman* vs. *Pendry* (8 Fed. 693); *Thallman* vs. *Thomas* (111 Fed. 277),

and other cases cited in the briefs. It will be observed from these cases, and by the admissions in brief, that it involved not only diligence and continuity, but *pedis possessio.*

GROUP DEVELOPMENT OF MORE THAN ONE CLAIM; AND PROGRESSIVE AND SUCCESSIVE DEVELOPMENT OF ONE CLAIM AFTER ANOTHER.

The position of the appellants that the order of withdrawal of September 27, 1909, relieved them of the necessity of doing work to the extent of the character, and at the place required for their protection by the laws of the United States before the order of withdrawal, is not well taken. Such was the view taken by those who urged for their protection the insertion of the proviso of the Pickett Act (pages 43 to 45, Appellee's brief); and it was what Congress meant when it said that the Act shall not "be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal * * * made prior to the passage of the Act."

As the Supreme Court said in the *Midwest Oil Co.* case (*Supra*): "in other words, if, notwithstanding the withdrawal, and the locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away such right." That

Court further said: "If a location made after the withdrawal gave the appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location." (236 U. S., p. 2.) In view of these considerations it is submitted that appellants' claim of title in No. 2787 and No. 2788 to several tracts, upon the ground that they were drilling a well on another tract not in suit, has no foundation in law. The progressive drilling on one quarter section, and thereafter on another, is not the kind of work contemplated by the statute as leading to the discovery of oil or gas on each quarter claimed. If discovery of oil on a particular quarter section cannot be said to be discovery on one or more additional quarters, the drilling on a particular quarter section cannot be said to constitute work leading to the discovery of oil or gas on one or more additional quarters. Whether the lands in suit would be drilled, by the appellants, clearly depended upon the contingency of finding of oil on another quarter not involved in suit. This is shown by the terms of the lease under which the drilling was carried on. Furthermore, this contention of appellants that any number of mining claims may be acquired on account of work done on one of them, violates the policy of the Mineral Land Law against monopoly. Such was not the law prior to the order of President Taft withdrawing from acquisition the petroleum lands or prior to the Pickett Act. A change, such as is contended for, would not tend to the conservation of petroleum, but otherwise, towards monopoly of large corporations.

The reasoning of Judge Ross, in the case *Gird* vs. *California Oil Co.* (60 Fed., 531), is particularly pertinent here:

> "These 80 locations, the plaintiffs contend, constitute a consolidated claim, the working of which could be best done by one agency and pursuant to one general system, the expenditures in pursuance of which could be legally and properly proportionately applied to the respective claims included within the so-called consolidated claim. If this can be legally done, it is quite manifest that 80 locations, embracing more than 8,000 acres of land, would not necessarily constitute the limit, but that the system may as well embrace every claim within the district, and thus an entire district be acquired by one agency pursuing a general system of development of the whole, and making annual expenditures equal in amount to the aggregate required by law to be made or performed upon the separate and independent locations. It is endeavored to sustain this position upon the theory that, as it is the policy of the law to encourage the greatest and most economical development of the mineral lands, it encourages such consolidation of ownership and operation of claims 'where all the mineral can be extracted from a large body of land more economically under one ownership, one system of management, one combined operation, than by the diverse and antagonistic operations of many claims.' And a great deal of testimony and other evidence was introduced to show that the nature of petroleum and the geological structure of the country comprising the Little Sespe petroleum mining district, and the effective drainage power of an oil well, are such that all of the locations can not only be best worked by one system, but that it is almost necessary that they should be

> so worked. * * * But, as the normal condition of petroleum is one of repose, and not of motion, and it belongs to the rock in which it is embedded, it would seem to be very clear that the only difficulty in the way of preventing the recovery by the owner of the oil so abstracted would be the difficulty of making the necessary proof."

After referring to the theory of economy of group and progressive development section by section, Judge Ross proceeds:

> "And such, the proof shows, was the plan of operations adopted by the lessees of the plaintiffs, in the pursuance of which they have expended annually more than $8,000, and in the aggregate more than $300,000. All of this, no doubt, greatly conduces to the profits of the plaintiff's lessees, and is very convenient. But I am unable to see that these facts at all answer the requirements of the law regarding the location and acquisition of placer mining ground, which is the same whether the mineral it contains be gold, silver, quicksilver, petroleum, or anything else, or the applicant for the government title be rich and able to conduct operations on a large scale, or poor and able only to make the annual expenditure of $100 in work or improvements."

In this connection, attention is called to the discussion in the main brief of the appellee, and to the letter of the Attorney General to the Secretary of the Interior, with reference to the decision of the Commissioner of the General Land Office, in the Honolulu case. The letter referred to is a part of a public document, printed as the hearings before

the Public Land Committee of the Senate. Three copies of that document were supplied, by permission of the Court, at the time of the oral argument.

Furthermore, as has heretofore been pointed out, if the occupancy or claim of a person was not such as, under the decisions of the courts, would protect the occupant against intrusion by third persons, it is not such as will, under the terms of the Pickett Act, protect the claimant against the withdrawal of the land by the Government.

The Pickett Act With Special Reference to Numbers 2787 and 2788.

In numbers 2787 and 2788 it is not even contended that work of any character whatever was in progress at the date of the withdrawal. All that appellants contend is that "drilling was actually proceeding on the adjoining claim" (top of page 23 of appellants' brief); and that "the sinking of the one well * * * is 'work leading to discovery of oil or gas' on every claim within the group" (bottom of page 40 of their brief).

It is urged that the Act is very broad in its scope, insomuch that it removes from the effect of the withdrawal not only the particular parcel of land included within the boundaries of a given claim upon which drilling was in progress, but also all other lands claimed, whether in the actual posses-

sion of the claimant or not, and even though no work whatever was in progress thereon at the date of the withdrawal. This contention has already been replied to herein. Of course, if this contention is sound, the actual possession of twenty acres coupled with the act of drilling a well thereon would enable the person so possessed and so drilling to hold not only one or two other claims, but one hundred or two hundred or even a thousand quarter-sections, notwithstanding the fact that he neither had actual possession of nor was doing any work upon any of them. The exigencies of the instant cases have required appellants to lay down on page 40 of their brief in Nos. 2787 and 2788 the proposition that "the sinking of the one well * * * is 'work leading to discovery of oil or gas' on every claim within the group"—that is, three others. If on three others, why not on three hundred? What, then, would become of the spirit of the public land laws against monopoly?

To sustain their position, appellants are driven to the extreme of asking this Court to hold that the Act was passed without thought or consideration, indeed in subversion, of existing statutes and long maintained principles. If the standard of diligence required by the Act is not referable to each parcel of land, then by the same token, since the idea of location is thereby impliedly destroyed, a discovery on one parcel would be good by implication as a discovery on the entire list of lands; the marking of the boundaries of each claim, which

normally follows discovery, would be by implication unnecessary; and development work amounting to $500.00 on each location would be by implication avoided—indeed, the entire form and structure of the pertinent mineral land laws would be destroyed by the same process of implication, a sound public policy enunciated by Congress half a century ago and effectuated by the Courts, Federal and State, in countless decisions, ruthlessly set at naught and the doors swung wide open to fraud and monopoly. No remedial statute ought to be so violently construed as to lead to such results.

The argument of appellants at the bottom of page 39 and on page 40 of their brief in Nos. 2787 and 2788 can lead nowhere short of the conclusion that, since the Act did not use the word location, it impliedly repealed all provisions of existing law governing mineral locations. If the Act protects "the whole tract of oil bearing lands so claimed," the only showing which a claimant would have to make would be that he was drilling a well at one point with the intention of subsequently developing a "whole tract of oil bearing lands" consisting of an absolutely unlimited number of sections; or, for that matter, he need not claim by sections or quarter-sections, but by wholesale he could make good his claim to an entire oil field.

The decision of the Commissioner of the General Land Office in the Honolulu case is referred to in the brief of opposing counsel. The position of the

Government with respect to that case is stated in the letter of the Attorney General heretofore referred to. Even in that case the Commissioner said:

> "It does not follow from the above, however, that a mere progressive development of a series of claims one after another, where the claims of the series last developed are not directly and necessarily dependent on the proper development of other claims in the group, would constitute diligence within the meaning of the Act so as to off-set the effect of an intervening withdrawal."

What the record in Nos. 2787 and 2788 discloses is "a mere progressive development"; and the Commissioner has sufficiently negatived the idea that the principles upon which a favorable determination was reached by him in the Honolulu case would be applicable here.

Certain Controlling Facts in No. 2789.

Certain general statements concerning the facts in No. 2789 were made on the oral argument and are contained in the brief of appellants. An ascertainment of the concrete, specific facts disclosed by the record will be not only profitable but determinative of this case. Appellants' position is that they had, prior to the withdrawal, done everything preparatory and necessary to beginning drilling operations except secure the requisite supply of water. "It was owing to the utter impossibility of getting sufficient water that the work of drilling was not started"

(R. 60). "That the said corporation was ready, able and anxious to proceed with the drilling of wells upon each of the four quarter-sections, and would have begun the drilling thereon immediately after the said 21st day of June, 1909, but for the said difficulty with water" (R. top 63).

The affidavit of M. J. Laymance, offered by appellants, shows that "actual drilling commenced on April 28, 1910" (R. 64).

Simultaneous drilling on the four quarters was said to be impossible because the supply of water was limited to "an amount adequate to drill but one well at a time"—according to the record (p. 65). At this point it becomes pertinent to ascertain just *what drilling was done after April* 28, 1910. One looks in vain to the affidavits offered by appellants for information at this point. They offer nothing whatever to this end except the general statement of M. J. Laymance that, while he "was interested in said property drilling operations were continued with all possible diligence," etc. (R. top page 66). It does not even appear when he ceased to be "interested in said property."

Over against this general statement of Laymance there is the affidavit of S. G. Tryon, offered by the Government, which gives certain specific and particular facts concerning these drilling operations. These facts furnish a complete refutation of appellants' claim that, once they got water, they dili-

gently drilled. At the top of page 53 of the Record he states that he was in charge of the work on the lands in question from March 15, 1910, to March 1, 1911.

At the top of page 53 Tryon deposes that drilling began on the southeast quarter between April 15, 1910, and May 28, 1910—appellants' witness Laymance, at the middle of page 64, states that "actual drilling commenced on April 28, 1910"—and continued until May 28, 1910, when a depth of 460 feet was reached.

On pages 53 and 54 Tryon states that drilling on the southwest quarter began June 20, 1910, and continued until July 17, 1910; that no drilling was done thereafter until it was resumed October 9, 1910, whereafter it was continued until October 12, 1910; and that no further drilling was done until after March 1, 1911, when he ceased to have charge of the work.

On page 54 Tryon states that drilling on the northwest quarter began July 25, 1910, and continued until August 22, 1910, when a depth of 620 feet was reached; and that no further drilling was done until after March 1, 1911, when he ceased to have charge of the work.

On page 55 he states that drilling on the northeast quarter began September 5, 1910, and continued until September 22, 1910, at which time a depth of 586 feet had been reached; and that no

further drilling was done until after March 1, 1911, when he ceased to have charge of the work.

Furthermore, Tryon states unequivocally at the bottom of page 65 that no discovery of oil or gas was made on any of the four quarters between March 15, 1910, and March 1, 1911.

Thus it appears, with reference to the southeast quarter, that drilling ended May 28, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

With reference to the southwest quarter it thus appears that drilling ended October 12, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

With reference to the northwest quarter, it thus appears that drilling ended August 22, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

With reference to the northeast quarter, it thus appears that drilling ended September 22, 1910, and was not resumed, if at all, until at some unknown time after March 1, 1911.

It is disclosed that as late as July, 1913, when the North American Oil Consolidated acquired and entered into the possession of these lands, there were only three completed wells, and this fact is found in the affidavit of Louis Titus offered by Appellants

(R. 77). Thus it is shown that one of the four wells begun in 1910 had not been completed in 1913.

It is to be observed that this evidence of drilling dates, while it was offered by the Government, is uncontradicted. From it it is apparent that, in the case of the southeast quarter, there was an interval of at least 9 months during which no drilling was done, although a supply of water adequate for drilling one well at a time had been secured April 28, 1910; that, in the case of the northwest quarter, there was an interval of at least 4 months and 18 days during which no drilling was done, although a supply of water adequate for drilling one well at a time had been secured April 28, 1910; that, in the case of the northeast quarter, there was an interval of at least five months, during which no drilling was done, although a supply of water adequate for drilling one well at a time had been secured April 28, 1910; and that no drilling whatever was done anywhere on the entire section between October 12, 1910, and March 1, 1911. Thus, by the uncontradicted evidence of the record, it is shown that for four months and 18 days appellants ceased drilling, although the only excuse that they urged for failure to begin drilling prior to April 28, 1910, was at that time removed.

If the construction of the Pickett Act for which appellants contend were sound, which it is not, namely, that it requires diligence only at the date of withdrawal and thereafter only after the date of

its passage, and that it condones failure of diligence during the interval between the withdrawal and its passage, it would nevertheless remain that if the Act requires continuation after its passage on June 25, 1910, and until discovery, the appellants have no rights. There was according to this record an interval of four months and 18 days after June 25, 1910, during which no work whatever was done nor excuse nor reason for failure even attempted. The Act offers refuge to the bona fide claimant or occupant only "so long as he shall continue in the diligent prosecution of said work." No matter how diligent appellants may have been from June 25, 1910, to October 12, 1910. They ceased their claimed diligence in October, 1910, and did not resume it until some undisclosed and unknown time after March 1, 1911. They took themselves from without the remedial provisions of the Act, and the withdrawal became operative to defeat their alleged "rights."

Appellants differ with the Government as to whether the diligence prescribed must have covered the period between the withdrawal and the passage of the Act; but they admit that there must have been diligence "at the date" of the withdrawal, and that there must have been a continuation of diligence after the passage of the Act; therefore, what is the correct construction of the Act as to diligence between the date of the withdrawal and the passage of the Act is, in the light of the evidence

of the drilling operations immediately above recited, merely academic as to No. 2789.

The Act Does Not Condone a Cessation of Work in the Interval Between the Withdrawal and the Date of Its Passage.

It is submitted that diligence during the interval between the date of the withdrawal and the passage of the Act is as much a requirement of the Act as diligence at the date of the withdrawal. The very wording of the Act must lead to this conclusion. The Act was addressed not particularly to the Taft withdrawal, but to "any order of withdrawal heretofore or hereafter made"; and not only required diligence "at the date of" any withdrawal, but provided that the right which it extended should "not be affected or impaired" *so long as there was a continuation* of "diligent prosecution of said work." The word "said" clearly relates the diligence as to which there must be a continuation to the diligence required "at the date of" the withdrawal. The suggestion that such a construction penalizes those who were diligent at the date of the Taft withdrawal, but ceased work thereupon out of respect to the order, while it rewards those who violated the order by continuing to work, is without force. Those who secured the passage of the Act sought favor for themselves and in the form which would be effective in their cases. At the date of the withdrawal they were in positions in which they represented that they could not cease work and this, not a lack

of respect, was put forward as reason for not stopping—this and their opinion that the order was invalid. That Congress responded in terms intended to aid them so representing their wants and failed to provide a remedy for others is not reason for giving the Act a construction which would do violence to its words and structure. The contention of appellants has no basis upon which to stand and their argument is merely *ab convenienti.* If Congress intended to do what appellants contend it intended to do, it would not have required a continuation of work, because that would not have met the exigencies of cases like those of appellants—they could not *continue* that which they were *not doing* at the time of the Act. If Congress had intended to include such cases, it would have exacted first a resumption of work and thereafter a continuation and would have employed language clearly conveying such a meaning.

The Water Question.

Appellants seek to differentiate the facts in No. 2789 from those in *United States* vs. *Midway Northern Oil Co.,* 232 Federal 619, 626. They do not challenge the soundness of Judge Bean's opinion, but say that theirs was no "mere effort to obtain water"; that they were at the date of the withdrawal "actually engaged in the prosecution of work necessary to the proposed drilling operations." What was the work in which they were "actually en-

gaged"? Clearing brush and leveling ground (R. p. 63). However, in another breath and immediately before making the above statement concerning clearing brush the same witness says at the top of page 63 of the record that they "would have begun the drilling thereon immediately after the said 21st day of June, 1909, but for the said difficulty with water." If clearing brush and leveling ground was necessary to drilling and was in progress September 27, 1909, how could they have begun drilling immediately after June 21, 1909? It must be apparent that the work of clearing and leveling is a mere specious excuse upon which to base a statement of diligence at the date of the withdrawal. The whole case of appellants is made by them to rest upon diligence predicated upon effort to get water. The record is writ large with protestation of readiness to drill if water had not been lacking. The absence of water is their excuse for failure to drill. They say they were ready if they had water; and effort, "mere effort"—they show nothing more—is set up as an excuse for failure to drill; for they say that they had done everything except get water. They were merely waiting for water; and they were also waiting to try out the region by wells on some lands before they determined to drill on the lands sued for.

It is difficult to conceive how this case can be distinguished from the Midway Northern case. No matter how diligent they may have been prior to September 27, 1909, it cannot be imputed to them

for diligence which was wanting on the crucial date and subsequently. It is said that on that date they were ready to drill, but were not drilling for want of water which they were making "mere effort" to get. If in the Midway Northern case there was nothing but effort to get water, appellants are in no better plight. So far as *work* is concerned, any diligence which they may have exercised had ceased on September 27, 1909, and on that day and thereafter for many days they were merely waiting to get water and test the field elsewhere. In the Midway Northern and in this case the excuse is the same—lack of water. It can make no difference how much or how little actual work had been done, if it had ceased. In neither case was there, on the date of the withdrawal, anything being done to get water, expect possibly some effort to buy it. Judge Bean has decided that this is not sufficient; that "the question is not whether the defendants were able to prosecute the work of discovery at the date of the withdrawal order, but whether they were actually engaged in such work at that time."

One observation applicable to all of the cases: If the conditions by which appellants were surrounded at the date of the withdrawal were such as would have afforded them protection against intruders, all that it is necessary for one claiming public mineral lands in an arid region to do is to take possession, build a camp and a derrick—nothing more—and resist the effort of one who has hauled his water or otherwise gotten it, and would

enter and actually drill, on the plea that he is waiting to get water. If he could do this for a month or six months, why could he not do so indefinitely—why could he not rely upon this defense until the water was actually brought to the land by the enterprise of others? To use the farmer as an illustration: would he be regarded as diligently preparing for a harvest while, after having done everything requisite to pitching his crop, he sits by and waits for others to project and perfect a scheme of irrigation?

Questions of Fact in This Case Are Not for the Land Department, and It Has Not Passed on the Facts.

The position of appellants, stated on pages 27 to 31 of their brief, is untenable. They assert the application for patent, and the issuance of a receipt, which they erroneously call a final certificate, gives to them a complete, equitable title, and that the Land Department, alone, can try the facts. In the cases of *U. S.* vs. *Devil's Den etc. Co.,* and *U. S.* vs. *Lost Hills etc. Co.,* the facts as to this phase were substantially similar to those in the cases at bar. This identical contention was made, and was decided adversely to appellants' present contentions.

The opinion of Judge Bean is an all sufficient answer. We set forth pertinent parts of it as Appendix A hereto. It should be called to the atten-

tion of this Court that since the oral argument the evidence has been presented to the District Court on final hearing in No. 2789.

In the brief of the appellants reference is made to a decision by United States District Judge Riner, in the case of *The United States* vs. *Ohio Oil Co., et al.,* and the Court is informed in the brief of appellants that the case has been affirmed by the Circuit Court of Appeals. The appellants expressed the expectation that the opinion of the Circuit Court of Appeals of the Eighth Circuit would sustain the contentions made by them. Since the oral argument, a copy of that opinion has been received, and will be furnished to the Clerk for the convenience of this Court. It will appear, from a perusal thereof, that no principle of law is there laid down which is at variance with the decisions of the District Judges in California who have recently decided oil cases pending here.

Respectfully submitted,

F. P. Hobgood, Jr.,
Frank Hall, and
E. J. Justice,
Attorneys for Appellee.

APPENDIX "A"

In the District Court of the United States for the Southern District of California, Northern Division.

HON. ROBERT S. BEAN, Judge Presiding.

UNITED STATES OF AMERICA, *Plaintiff,* vs. DEVIL'S DEN CONSOLIDATED OIL COMPANY, LOST HILLS MINING COMPANY, and LOST HILLS MINING COMPANY, *Defendants.*	(Three cases) Nos. A-37, A-52, A-57 respectively In Equity.

OPINION.

APPEARANCES:

For Plaintiff:

E. J. Justice, Special Assistant to the Attorney General;

Frank Hall, Special Assistant to the Attorney General.

For Defendants:

Joseph D. Redding, Esq., Earl G. Pier, Esq.;

Edmund Tauszky, Esq., and Peter F. Dunne, Esq.

Extracts From Judge Bean's Opinion.

* * * * * * * *

The broad question then is whether the mere acceptance by the Land Office of an application for a patent to a mining claim in due form from a private individual, and the payment by the latter of the purchase money after the required notice has been given, is a bar during the pendency thereof in the Land Department to a suit by the Government to cancel and annul the interest of the application, if any, and determine his right to possession and to extract and market the mineral, on the ground that the application for patent and the proceedings connected therewith were and are fraudulent, wrongful and unlawful.

In my judgment it is not. The proceedings are wholly *ex parte* as to the Government and can have no greater effect than if the patent had actually issued, and it is settled law that the issuance of a patent under such circumstances is not a bar to a suit by the Government to vacate or annul such patent if fraudulently and unlawfully obtained, or issued by mistake or inadvertence of the officers of the Land Office. (*Hughes* vs. *United States,* 4 Wallace 232; *Germain Iron Co.* vs. *United States,* 165 U. S. 379; *Washington Securities Co.* vs. *United States,* 234 U. S. 76; *Linn & Lane Timber Co.* vs. *United States,* 236 U. S. 574.) I do not think any greater virtue should be accorded to a mere *ex parte* preliminary proceeding. It is insisted, however,

that as the applications for patent are now pending and undetermined in the Land Department, the Court will not assume jurisdiction even if such applications are fraudulent and unlawful, until they are finally disposed of by the Department. The Land Department is vested conformably to the Acts of Congress, with the exclusive jurisdiction to determine the rights of claimants to public lands, and until it has exhausted its jurisdiction by the issuance of a patent, a Court will not assume to determine which of two rival claimants is entitled to the property (*Johnson* vs. *Towsley,* 13 Wall. 72; *Marquez* vs. *Frisbie,* 101 U. S. 473). But the Government is not an adverse party to a proceeding to acquire title to its property, nor is the Land Department a tribunal to which it must submit its rights or litigate with one who has taken possession of its property or has attempted to acquire title thereto. The notice required by statute of an application for patent to a mining claim is designed and intended to cut off the rights of private claimants and not the Government of the United States. It is given in order that all persons having adverse claims may be heard in opposition to the issuance of the patent. But (Sec. 2325) "If no adverse claim shall have been filed it shall be presumed that no adverse claim exists, and thereafter, no objection from third persons to the issuance of patent shall be heard except it be determined that the applicant has failed to comply with the terms of this chapter." Sec. 2325 R. S. If, however, no adverse claim is filed during the period of publication, the adverse

claimant is required by section 2326 to commence within 30 days thereafter proceedings in a court of competent jurisdiction to determine the same, thus clearly showing that the purpose of the statute is to make the proceedings binding on private parties and not the Government. There is no reason to be found in the relation of the Government to such proceeding which will deprive it of the same right to relief if the proceedings are fraudulent or unlawful as an individual would have in regard to his own contract procured under similar circumstances. Indeed, there are reasons why it should not be denied the right to invoke the right of a court by the mere receipt and acceptance of an application for a patent and the purchase price by an officer of the local Land Office, for, as said by Mr. Justice Miller in *United States* vs. *Miner* (*Supra*): "In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own purchase, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is generally reduced to a formula. It is not possible for the officers of the Government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceedings whatever. The United States is passive; it opposes no

resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentations, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

I am of opinion, therefore, that the Court has jurisdiction to try the questions involved in these cases. If, however, I am mistaken as to the extent of the jurisdiction, the Government is clearly entitled upon the allegations of the bill and the showing made to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department out of the court. (*Northern Lumber Company* vs. *Ryan,* 124 Fed. 819; *El Doro Oil Company* vs. *United States,* 229 Federal 246.)

Even where land has ceased to be public lands by pre-emption, homestead and like claims but to which claimant has not perfected his title, they are still so far public lands of the United States that the Government may protect them from waste. (*Shiver* vs. *United States,* 159 U. S. 491.)

The Land Department has no general equitable power. It cannot grant injunctions, appoint receivers, nor, by its orders or decrees prevent trespass upon or protect the public domain from spoliation. It is true under the Act of Congress of August 25, 1914, the Secretary of the Interior is authorized in his discretion to enter into agreements with a certain class of applicants for patents for oil and gas lands included within an order of withdrawal, relative to the disposition of oil or gas produced therefrom. This is a discretionary power probably intended for the benefit and to protect from liability these trespassers, those who in the judgment of the Secretary have mistakenly trespassed upon land not open to entry and in good faith expended money in prospecting for oil and in the development and the improvement of the property. In one of the cases now under consideration an application for such a contract has been made and denied by the Secretary on the ground and for the reason that suit was then pending in this court. His reasons for refusing to enter into the contract are not the subject of review here. It is enough that no such contract has been made.

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